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PUBLIC UTILITIES
COMMISSION

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII

In the Matter of the Application)	DOCKET NO. 2009-0048
)	
MOLOKAI PUBLIC UTILITIES, INC.)	MOTION TO INTERVENE;
)	CERTIFICATE OF SERVICE
For review and approval of rate increases;)	
revised rate schedules; and revised rules.)	
_____)	

MOTION TO INTERVENE

Comes now West Molokai Association ("WMA" or "Movant") by and through its legal counsel, William W. Milks, pursuant to Sections 6-HAR-61-41 and 55 through 57, to move this Commission to fully participate as a party in the above-captioned proceeding.

INTRODUCTION

There is a compelling need to thoroughly investigate the rates proposed by Molokai Public Utilities, Inc. (MPU) in a contested case proceeding. Receipt of testimonies in an evidentiary hearing is essential, due to the allegations made at the September 3, 2009 public hearing.

The granting of WMA's motion provides the Commission the benefit of WMA's analysis (Refer, Part X, *infra*). By matter of law, the grant of invention also expands the time for

meaningful investigation, from the approximate 100 days remaining, to the customary nine month period of time the Commission normally has available to investigate rates.

Importantly, the development of a complete record during a full nine month period will enable the Commission to compile evidence needed to base its determination that MPU is failing to provide reasonable utility service. With such a finding of fact – based on evidence – the Commission is well positioned to implement Act 74 (SLH 2009), as intended. Certain testimonies received at the September 3, 2009 public hearing on MPU's rate proposal, if confirmed as true, provide this Commission ample justification to appoint a receiver, pursuant to Act 74.

A grant of WMA's request for intervention as a party will provide an additional three months of time needed to conduct a thorough investigation (a) to determine reasonable rates, and (b) to determine if the nature of MPU's failures require the appointment of a receiver. Participation by WMA, the County of Maui, and possibly others will assist in the development of the record upon which the Commission can make informed determinations. The following appear to be the major areas of concern to WMA:

- WATER QUALITY: Allegations of the substandard quality of the water – if proven to be true – have significant public health and safety consequences.
- FINANCIAL RECORDS: Discrepancies between audited financial reports, on the one hand, and the unaudited financial reports and the verified testimonies containing financial information and data, on the other hand. Photographs of MPL personnel disposing of voluminous business records, at the time of shutting down ranch and resort operations suggest this topic to be a fertile area of investigation.

- ADJUSTMENT CLAUSES: Approval of the two proposed automatic adjustment clauses (one for diesel fuel; the other for electric power), require detailed findings by the Commission, as a prerequisite to approval. (Refer, subsection 269-16(g)(1)-(5), HAW REV STAT.)
- ASSIGNMENT OF COST RECOVERY: Reallocation of the means of recovering fixed and variable costs, in accord with a responsible cost-of-service study, which is compelled by (a) a long-standing absence of such a study, (b) recent dislocations of components in MPU's market, due to the shutdown of MPU's ranching and visitor operations, and (c) obvious gross inequities among classes of MPU's customers (eg: residential consumers versus the wholesale customer; usage rates versus the water availability rates; etc).
- MIS/DOA AGREEMENT: Long outdated terms and conditions for transporting the water must be renegotiated in the Department of Agriculture lease and the MIS usage agreement.
- ADEQUACY OF MANAGEMENT: The sole officer and the sole director of three separate but affiliated utilities – including MPU – lives in New Zealand, and is absent during times when MPL's utility systems are in urgent need of attention.
- WATER LOSSES: MPU's own documentation reveals that its water distribution system is losing 23% of its water – an unacceptable percentage, especially in light of the extremely high costs of pumping. MPU's retail customers are being asked to pay the bulk of the total costs. Abnormal water losses are occurring at a time when leaks are allegedly occurring both on MPU's side of residential meters and on the customer-side of MPL-owned properties. If the allegations of leaks are

true, and are going unattended while top management is in New Zealand raises new, more significant issues.

- **BREACHED AGREEMENTS:** County of Maui has compiled 34 agreements between the County of Maui and MPL (and its predecessors and successors). In 89 separate factual allegations in its complaint [in Civil No. 08-1-0493(1)] the County contends such agreements have been breached due to MPL's failures to properly maintain and operate its utility services. WMA's intent is not to litigate Civil No. 08-1-0493(1), but rather to clearly ascertain for the Commission's benefit where the various responsibilities lie, under the applicable laws, or by contract.

The remainder of this motion conforms to the form and content requirements set forth in Subsection 6-HAR-61-55(b).

I

COMMUNICATIONS REGARDING THIS MOTION TO INTERVENE

All pleadings, correspondence and communications regarding this Motion to Intervene should be addressed as follows:

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Copies of all pleadings, correspondence and communications regarding this motion are to be sent to counsel for WMA:

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It is respectfully requested that service of all pleadings and filings made with the Commission be sent to the aforementioned individuals at both their e-mail addresses and their postal addresses.

II

NATURE OF MOVANT'S RIGHT TO PARTICIPATE AS A PARTY

[Refer Subsection 6-HAR-61-55(b)(1)]

WMA is a non-profit corporation organized to monitor the management, maintenance, protection, preservation, architectural control, and development of its members' properties of the Island of Molokai and to promote the health, safety, and welfare of its members, within the area commonly referred to as "West Molokai" or "Kaluakoi."

WMA's membership is comprised of owners of 800-plus properties located within the Kaluakoi/West Molokai area. A majority of the single residential properties are vacant lots, most of which are provided standby water service. Water service is provided to WMA's members by MPU.

On June 29, 2009, MPU filed an Amended Application to increase its retail usage rates for potable water by 202.2 percent (the total percent increase over the most recent properly established rate of \$3.18 per thousand gallons). Stand-by charges and per hydrant/stand-by pipe rates are proposed to be increased by the same 202.2%.

III

WMA'S PROPERTY, FINANCIAL AND OTHER INTERESTS IN THE PENDING MATTER

[Refer Subsection 6-HAR-61-55(b)(2)]

The Kaluakoi/West Molokai area includes homes and lots in the Papohaku Ranchlands area, three condominium projects, homes and lots on the recently closed golf course, Moana Makani homes and lots, and Papohaku Beach Park, as well as other public beaches and facilities, and fire hydrants situated adjacent to streets and loop roads. All of the homes, condominiums, and public facilities require the essential service provided by MPU in order to protect private and public health and safety.

The proposed level of rates, if approved, would increase consumers' costs to approximately one cent per gallon. The proposed rate will make customary household uses (e.g. lawn irrigation, house cleaning, car washing, etc.) expensive, to an extreme degree; at the proposed usage rate, use of MPU water will make agricultural usage prohibitively expensive.

IV

THE EFFECT OF MPU'S PROPOSAL ON WMA'S INTERESTS

[Refer Subsection 6-HAR-61-55(b)(3)]

Approximately one year ago, the Commission was responsive to MPL's claims, made on behalf of its two owned water utility companies. MPU received the rate relief MPL requested. At that time, WMA's request to participate was rejected by this Commission.

Now, it is WMA's turn to be heard; and now is the time for MPU to carry its burden of proof to demonstrate clearly and convincingly that its proposed rates are reasonable, and that its failings as a water utility can be righted, without appointment of a receiver.

WMA believes it is only the Commission who can protect and advance the interests of WMA's members.

V

NO OTHER FORUM GIVES PROMISE OF A SOLUTION TO THE WATER PROBLEMS WMA'S MEMBERS CONFRONT **[Subsection 6-HAR-61-55(b)(4)]**

Fifteen months ago, both the Governor and the Mayor of the County of Maui attempted to assist in resolving MPL's threat of abandonment of its public service company obligations. The threatened crisis was averted; the underlying causes of the problems remain.

The State Legislature looked at the situation and opted to authorize this Commission to appoint a receiver, if and when circumstances dictate. Without question, this Commission is the only forum that gives promise of finding solutions to WMA's water problems. In a nutshell, the key problems are exorbitant rates and service so inferior that appointment of a receiver is in order, if allegations are proved true.

Only the forum of contested case proceeding, with witnesses for all interests placed under oath and subject to perjury will work under existing circumstances. WMA believes an evidentiary hearing is the proper course of action, and that course can be pursued only through the Commission.

VI

WMA'S SPECIFIC INTERESTS WILL NOT BE REPRESENTED BY ANY OF THE EXISTING PARTIES

[Subsection 6-HAR-61-55(b)(5)]

WMA has valuable information which may ultimately assist the Commission in this proceeding. WMA's members have been closely monitoring the water situation on the island for several years. Also, WMA is intimately familiar with controversies regarding the permitting and transportation of water from Well No. 17 across Molokai's central plateau, to West Molokai.

WMA was a party to the permitting process of the Hawaii Commission on Water Resource Management ("CWRM"). WMA can accurately represent to this Commission events that transpired in the CWRM cases, and the subsequent appeal.

WMA has access to information unavailable to DCA and the Commission, which information will be assistance to the Commission in arriving at a better informed decision in this case.

The interests of WMA are distinguishable and can otherwise be differentiated from the interests of the Hawaii Division of Consumer Advocacy (DCA). Because DCA must represent the interests of customers of Waiola O Molokai (which customers include Mauanaloa, Kualapuu, south Kalae and other adjacent areas in Central and West Molokai) there is less time for DCA to focus of WMA's particular interests. Two Molokai water company rate cases pending concurrently presents practical problems for DCA: (a) the work load of DCA, and (b) conflicts of interests. Relative to the former, DCA staffing is at 52 percent (12 persons out of 23 authorized positions), during a period when major generic proceedings are underway, related to Hawaii's Clean Energy Initiative. DCA will do the best it can for WMA's members, but its "best" may not be sufficient.

Relative to the potential conflict of interest, major cost components of the two water utilities need to be re-allocated between the companies (or to the common sole shareholder), in order to more appropriately align variable costs with usage rates, and fixed costs to regularly-recurring and standby fees and charges. WMA can do this analysis and make better arguments than any other party, including DCA.

Also, DCA neither directly nor indirectly suffers the consequences of Commission decisions adversely impacting consumers. Only actual consumers have that unique perspective to offer the Commission; given the level of proposed rates, it is critical that those impacts be taken into consideration by this Commission. For example, some of WMA's members are in a dilemma: County codes require them to conduct agricultural activities on their parcels but the level of the proposed rates for water preclude any agricultural activity.

In light of earlier actions taken by MPL and MPU over the past 15 months, WMA must now be heard. WMA represents the majority of MPU's customer base. WMA will work with MPL, MPU, DCA and the Commission in a constructive fashion, seeking a long-term solution. In the course of those efforts, WMA can make valuable contributions to the record that no other party can offer.

VII

WMA'S PARTICIPATION WILL ASSIST IN THE DEVELOPMENT OF A SOUND RECORD

[Subsection 6-HAR-61-55(b)(6)]

WMA has valuable information which will assist the Commission in its fact-finding efforts. (Refer, Introduction and Part VI). WMA has been an active party to CWRM's permitting processes. In that proceeding, MPL initially represented to the CWRM that it was participating on behalf of its subsidiaries' utility customers. But MPL "dropped the ball" by

missing filing dates. MPU's legally enforceable right to pump water from Well No. 17 has been placed in jeopardy by laches and lapses by MPL and MPU. WMA knows the situation and will provide material evidence on this and similar issues.

WMA's members – among others – testified at the September 3, 2009 public hearing as to the number and extent of the leaks in the system. It is WMA's membership that has received correspondence from MPU warning of the conditions of water.

By and through WMA's role as a party in an evidentiary hearing, a complete record can be developed to assist the Commission in all respects.

VIII

WMA'S PARTICIPATION WILL NOT UNDULY BROADEN THE ISSUES OR DELAY THE PROCEEDING **[Subsection 6-HAR-61-55(b)(7)]**

The Commission has yet to articulate the issues to be determined in this proceeding. It remains uncertain as to the breadth of the issues to be resolved, or the depth to which a particular issue may be explored. WMA commits to participate in a constructive fashion in all such respects. Because its members are major stakeholders in the outcome of this proceeding, WMA is motivated to articulate its position on issues formulated by the Commission, and to then substantiate its position on those issues in the most informed manner possible.

The legal issues are limited: the reasonableness of MPU's proposed rates and the prudence of its investment in plant. But the factual matters to be reviewed are quite broad – and made so by MPU's past actions and inactions. It is MPU which has broadened the factual matters which are of interest to WMA and the Commission. WMA's intervention – and the additional three months time for the contested case proceeding, which accompanies an intervention – does not create undue delay. Instead, granting intervention provides the additional

90 days needed to address factual matters raised by MPU's actions, inactions, and its Amended Application.

IX

WMA'S INTERESTS IN THE PROCEEDING DIFFER FROM THE GENERAL PUBLIC **[Subsection 6-HAR-61-55(b)(8)]**

WMA's fundamental objective in this proceeding is to ensure the reliable provision of potable water at reasonable rates over the long-term. Presumably, this is the objective of the Commission, and DCA, as well. But there are distinctions. WMA members' perspectives on the anticipated issues in this case are based on first-hand experience. WMA's testimonies will be valuable to the Commission. Granting, WMA full party status in a contested case proceeding, ensures the development of a complete record; at the same time, WMA's participation as a party may lessen the load on the staffs of DCA and the Commission to compile and present evidence.

X

WMA'S TENTATIVE POSITION ON COUNTY OF MAUI PROPOSED ACTIONS. **[Subsection 6-HAR-61-55(b)(9)]**

RATES.

WMA takes the tentative position that the rates proposed for Phase I and Phase II are unreasonable and unjust, not justified with reliable evidence, and are unjustifiable. MPU's history of investment in utility infrastructure and faulty operations raises the legal issues of imprudent investment and imprudent management. Those issues, in turn, present to the Commission the unavoidable issue of whether MPU is failing to provide reasonable service.

WMA's preliminary adjustments to MPU's rate justifications are based on well-established rate-making principles, including (a) normalization, (b) cost causation, (c) credibility, and (e) placement of the burden of proof on the Applicant.

(a) **Normalization**. Nothing about the operations of MPU is normal. The market MPU now serves is vastly different than the market it served two years ago. MPU's operations are abnormal – contaminating pure ground water; its sole officer/director residing in New Zealand, etc. MPL's voluntary shutdown of the Kaluakoi complex along with the golf course's irrigation system is very disruptive to MPU's operations. Now, the owner of MPU proposes to profit from its voluntary decision to eliminate a large portion of the demand for MPU's water, by shifting all costs onto the remaining customers. (Refer, Exhibit MPU 11.1, pages 1 and 2.) Either the size of the demand for water must be enlarged, for rate making purposes, or the costs of supply (at least the fixed costs of supply) must be reduced, for rate-enabling purposes.

(b) **Cost causation**. Under any of the scenarios this Commission may apply to evaluate this rate request, the fact will remain that MPU's proposal rates fail to recover any significant amount of fixed costs from regular, recurring charges. (Refer, Exhibit MPU 10, page 1 of 1, lines 1 and 3.) No reliable cost-of-service study is available (even basic data essential to commence such a study has not been made available) to WMA at this time. However, a \$36.00 annual bill (\$72.72 proposed annual bill) to lot owners who have a water main pass in front of their lots, does not cover a lot owner's fair share of the embedded, fixed costs. The entire MPU system was built to serve MPL's development plans. FN Yet it appears that Approximately 200 of the 1150 planned residential units are paying usage rates. (Refer, Exhibit 11.1, page 1 of 3.) More substantial amounts should be recovered from monthly water availability charges to pay a fair

FN The Commission has long adhered to the sound rate making principle that a land developer recovers all of its capital costs for a water utility plant in the purchase prices of the original sale of lots. The presumption is rebuttable, but only with detailed accounting records. Because MPU's sole parent is a developer and sells parcels, much of the original cost of the MPU plant-in-service may already have been recovered. Relevant evidence on this topic is in order, because testimonies at the September 3, 2009 public hearing allege recent sales of lots by MPL.

portion of the fixed cost components [e.g. the long-standing rental payment to the Hawaii Department of Agriculture (\$144,456); a portion of the repairs and maintenance expense (\$65,812); depreciation (\$92,479)].

Beyond these amounts, the wholesale rate charged Waiola O Molokai (\$1.125/1,000 gal, at present) fails to cover pumping and water lifting costs; even the proposed rate (\$3.3984) is not fully compensatory. Therefore, cost causation needs to be reviewed, in detail. The remaining 100 calendar days in the expedited process is an insufficient amount of time.

(c) **Credibility**. Credibility can be evaluated in many ways. MPL's actions over the past 12-15 months goes to credibility. MPU's documents – even audited financials (Refer, Exhibit MPU 2, Schedule 4) – raise more questions than they answer. For example, rate case exhibits show MPU's original cost of plant-in-service at \$6,575,783 (as of 6/30/09; refer Exhibit MPU - 9), but KPMG, LLC's audit records all plant, property and equipment at \$1,680,419 (as of 12/31/09). Who owns the plant? Which entity should be taking depreciation as an expense? And what portion of monthly fees being paid to MPL by MPU and Waiola O Molokai are valid for rate making purposes? Did MPL's predecessors-in-interest already recover the original costs of MPU's plant-in-service via the original sales of lots? Discovery of facts is in order.

(d) **MPU's Burden of Proof**. There are degrees of proof: beyond a reasonable doubt; clear and convincing; a preponderance; plausible, etc. MPU's burden of proof in this proceeding needs to be clear and convincing – not in the legalistic sense, but in the practical sense of forcing MPU to be clear and convincing on each and all of the factual issues its Amended Application has raised.

APPOINTMENT OF RECEIVER.

Discrepancies exist between MPU's audited accounts, on the one hand, and the unaudited accounts initially verified as true by MPU. The significance of the discrepancies needs to be examined and assessed. Because corporate veils between and among MPU, Mosco, Inc., and Waiola O Molokai, Inc. have been pierced, misrepresentations attributable to the owner of MPU/MPL may be attributable to the Singapore-based parent of MPL. Intentions need to be discussed.

In accord with established Commission protocols, Applicant's testimony, supporting Exhibits and work papers must present a prima facie case supporting the requested increases. If MPU fails to make a credible case in its direct testimonies and exhibits, its application is subject to summary dismissal. WMA does not seek that outcome; it seeks disclosures. Neither is WMA contending that this proceeding be transformed from an investigation into the reasonableness of water rates, into a more generic investigation to determine the propriety of the appointment of a receiver.

Rather, WMA's position is that WMA's "Motion to Intervene" be granted, the granting of which does alter the nature of this proceeding from an expedited small utility rate case, to a contested case hearing. This, in turn, places Mr. O'Brian and Mr. Nicholas under oath, to be cross examined as to MPU/MPL's recent decisions and actions, and its plans for the future, with regard to MPU's water service. Such an evidentiary record could then or later be utilized by this Commission, for purposes of evaluating the MPU's failures to provide adequate and reasonable water service. Only then will the Commission know with a reasonable degree of certainty the extent of water leakage, the potability of the water; the size and nature of the projected demand for MPU's water, the lack of involvement by MPU's management, etc. Only when the vast array

of such facts are compiled, under oath, can the Commission give consideration to implementing Act 74 (SLH 2009). FN

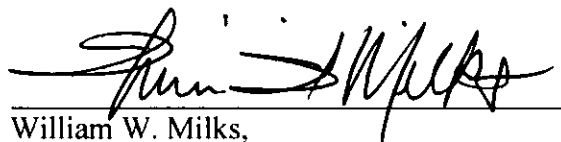
XI

CONCLUSION

Based on the foregoing, WMA respectfully requests the Commission to grant WMA full participation as a party, without limitation.

Dated: Honolulu, Hawaii, September 11, 2009.

Respectfully Submitted,


William W. Milks,
Counsel for West Molokai Association

FN

§ 269 - Appointment of receiver for public utilities.

Whenever the commission finds that a regulated water utility or regulated sewer utility is failing...to provide adequate and reasonable service to its customers and that the failure is a serious and imminent threat to health, safety, and welfare, the commission may appoint a receiver...to bring the service up to appropriate regulatory standards...Expenditures shall be funded in accordance with generally accepted ratemaking practices. Any costs incurred by the commission, its staff...shall be the responsibility of the utility in receivership or its ratepayers. (Act 74; SLH 2009)

CERTIFICATE OF SERVICE

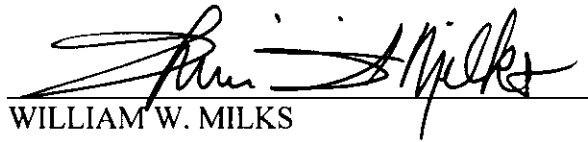
I hereby certify that two copies of the foregoing application, together with this Certificate of Service, have been duly served by United States mail, postage prepaid, to:

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